STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SAN JUSTO RANCH/WYRICK FARMS Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 82-CE-2-SAL 9 ALRB No. 55

DECISION AND ORDER

On October 4, 1982, Administrative Law Judge (ALJ)[1/] Thomas M. Sobel issued the attached Decision in this proceeding. Thereafter Respondent, General Counsel and the Charging Party, United Farm Workers of America, AFL-CIO (UFW or Union) each timely filed exceptions and a supporting brief. Respondent also filed a reply to the exceptions of General Counsel and the Charging Party.

The Agricultural Labor Relations Board (ALRB or Board) has considered the record and the attached Decision in light of the exceptions and supporting briefs, and has decided to affirm the ALJ's rulings,[2/] findings, and conclusions only to the extent

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[1/] At the time of the issuance of the ALJ's Decision, all ALJ's were referred to as Administrative Law Officers. (See Cal. Admin. Code, tit. 8, § 20125, amended eff. Jan. 30, 1983.)

[2/] We do not affirm the ALJ's ruling that evidence of a preelection promise to give a party if the Union lost was inadmissible to prove Respondent's motivation in refusing to bargain. Although the ALJ has great latitude in conducting the hearing and establishing the record, we hold that the evidence proffered was relevant to this proceeding and should have been admitted. However, since the proffered evidence would not affect the outcome of this case, a remand is not necessary.

consistent herewith.

Introduction

On August 18, 1980, an election was conducted among Respondent's agricultural employees. The UFW won that election by a vote of 41 to 33, with 4 challenged ballots, insufficient in number to affect the results of the election.

Respondent filed a timely objection to the election, alleging that 55 garlic harvest workers, who voted in the election, were not Respondent's agricultural employees. This objection was heard by an Investigative Hearing Examiner (IHE) on April 7 and 8, 1981. On June 1, 1981, the IHE issued his Decision recommending that Respondent's objection be dismissed. After considering Respondent's exceptions to the IHE's Decision, the Board concluded that Respondent was the employer of the garlic harvest workers and certified the UFW as the exclusive collective bargaining representative of all Respondent's agricultural employees on October 2, 1981. (San Justo Farms (1981) 7 ALRB No. 29.)

Technical Refusal to Bargain

On October 12, 1981, the UFW requested that Respondent begin negotiating a full collective bargaining agreement. Respondent informed the UFW on December 21, 1981, that it was refusing to bargain in order to test the validity of the certification. The UFW filed a charge on January 7, 1982, alleging that Respondent had refused to bargain in good faith regarding a collective bargaining agreement. A complaint issued on February 16, 1982, and the allegation was set for hearing before an ALJ on May 25 and 26, 1982.

Respondent stipulated at the hearing that it had refused to bargain, but denied violating Labor Code section 1153(e) and (a),[3/] since it contends the UFW was not properly certified. Respondent further argued that because its election objection was reasonable, and raised in good faith, under our Decision in J. R. Norton Co. (1980) 6 ALRB No. 26, Rev. den. by Ct.App., 4th Dist., Div. 1, (Jan. 7, 1981), the makewhole remedy was not applicable.

The Makewhole Remedy Under the Norton Standards

The California Supreme Court in J. R. Norton Co. v. Agricultural Labor Relations Board (1979) 26 Cal.3d 1, struck down the Board's rule that the makewhole remedy was applicable in all cases where the employer refused to bargain, including those cases where the refusal was utilized as a means to obtain judicial review of the Board's action in certifying the union.[4/] Such a blanket imposition of makewhole relief, the court reasoned, would discourage an employer from seeking judicial review of a meritorious claim that an election did not represent the free choice of the employees as to their bargaining representative. The first lesson from Norton, then, is that in technical refusal-to-bargain cases we must proceed on a case-by-case basis.

[3/] All section references herein are to the California Labor Code unless otherwise stated.

[4/] An order in a certification proceeding is not directly reviewable in the courts, since it is not a "final" order within the meaning of Labor Code section 1160.8. It is only by refusing to bargain with the certified union that an employer may obtain judicial review of the Board's certification and its finding that the refusal was an unfair labor practice. (Nishikawa Farms, Inc. v. Mahony (1977) 66 Cal.App.3d 781, 787.) Such employer conduct is known as a "technical refusal to bargain."

In Norton, the court advised us to use the following standard in determining when to apply the makewhole remedy:

> ... the Board must determine from the totality of the employer's conduct whether it went through the motions of contesting the election results as an elaborate pretense to avoid bargaining or whether it litigated in a reasonable good faith belief that the union would not have been freely selected by the employees as their bargaining representative had the election been properly conducted. We emphasize that this holding does not imply that whenever the Board finds an employer has failed to present a prima facie case, and the finding is subsequently upheld by the courts, the Board may order make-whole relief. Such decision by hindsight would impermissibly deter judicial review of close cases that raise important issues concerning whether the election was conducted in a manner that truly protected the employees' right of free choice. As discussed above, judicial review in this context is fundamental in providing for checks on administrative agencies as a protection against arbitrary exercises of their discretion. On the other hand, our holding does not mean that the Board is deprived of its make-whole power by every colorable claim of a violation of the laboratory conditions of a representation election: it must appear that the employer reasonably and in good faith believed the violation would have affected the outcome of the election.
> (26 Cal.3d at 39.)

We took this language to mean that to avoid makewhole liability, in a technical refusal-to-bargain case, the employer's litigation posture before the Court of Appeal must be both reasonable and in good faith.[5/] We further recognized:

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[5/] In a series of decisions issued after Norton, this Board held that technical refusal-to-bargain cases would be reviewed first for the reasonableness of the employer's litigation posture and, only where such posture was found to be reasonable, reviewed for good faith. That rule was established to avoid remanding numerous cases for hearing on the issue of good faith. Since the instant case was tried on the theory of good faith, we see no reason to address the issues in any particular order. (Cf. Holtville Farms, Inc. (1981) 7 ALRB No. 15.)

> ... that an employer may act in good faith, while not having a reasonable basis for his position. An employer may also offer a reasonable basis, while not acting in good faith as shown by the totality of the circumstances. (6 ALRB No. 26 at p. 3.)

Respondent's Good Faith

The ALJ concluded that, although the merits of the Board's certification decision at 7 ALRB No. 29 were not subject to relitigation in this unfair labor practice proceeding (see D'Arrigo Brothers of California (1978) 4 ALRB No. 45), Respondent's litigation posture was reasonable and in good faith. He therefore concluded that, although Respondent had refused to bargain, in violation of section 1153(e) and (a), it was inappropriate to order that Respondent make its employees whole for any economic losses resulting from the refusal to bargain.

We conclude, contrary to the ALJ, that Respondent demonstrated a lack of good faith by delaying the bargaining process and by other acts indicating Respondent's desire to avoid the process of collective bargaining.

Unlike the ALJ, we give great weight to Respondent's failure to respond in a timely manner to the Union's request for bargaining. Although the UFW sent its request on October 12, 1981, Respondent did not respond until December 21, 1981. We find that that delay shows Respondent's disdain for the status of the certified representative of its employees and evidences Respondent's intent to avoid its bargaining obligation. (See Holtville Farms, Inc. (1981) 7 ALRB No. 15; Rev. den. by Ct.App., 4th Dist., Div. 1 (Dec. 31, 1981), hg. den. by S. Ct. (Jan. 28, 1982); Robert J. Lindeleaf (1983) 9 ALRB No. 35; Grant Harlan Farms (1983)

9 ALRB No. 1.)

Our negative evaluation of Respondent's attitude toward the bargaining process is reinforced by statements and actions of its supervisor, Rafael Duarte. Employee Nemorio Ramirez testified that, after the election, Duarte told him that another election might be necessary and that even if the second election was valid, the company was not going to sign a contract with the Union. Although the ALJ found Ramirez a hostile witness, his testimony was credited over Duarte's denial. While we agree with the ALJ that Duarte's statement does not indicate that Respondent would never sign a contract, we find that it does tend to show that concern about the validity or invalidity of the election was not Respondent's real reason for refusing to bargain. (See Holtville Farms, supra, 7 ALRB No. 15.)

Finally, we find that Respondent's refusal to rehire garlic harvest workers after the election in retaliation for their pro-union votes and Respondent's denial of access to a UFW organizer,[6/] though not conclusive in themselves, also support our conclusion that Respondent here has refused to bargain in a bad

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[6/] We disagree with the ALJ's decision not to rely on evidence that Respondent engaged in acts of discrimination after the election and interfered with union access prior to the election. The question of Respondent's bad faith requires a review of the totality of the circumstances raised in both the representation case and the subsequent unfair labor practice case. Where evidence is offered which tends to indicate Respondent's overall attitude toward collective bargaining, and Respondent fails to rebut or discredit that evidence, the evidence will be given its due weight. Although the evidence of those acts was admitted for a limited purpose in the representation case, Respondent here was on notice that all circumstances were relevant to the question of "good faith." We have therefore considered those acts in deciding this case.

faith effort to delay bargaining as long as possible.

Reasonableness of Respondent's Litigation Posture

The ALJ herein also concluded that Respondent was "reasonable" in seeking judicial review of its election objection because the underlying issue of the appropriate agricultural employer is, by the Board's characterization in San Justo Farms, supra, 7 ALRB No. 29, a complicated one. The ALJ expressly rejected the Charging Party's argument that Respondent's litigation posture was per se unreasonable because it challenged the Board's discretion in determining the scope of the bargaining unit, an area in which Board decisions are accorded great deference and rarely disturbed on appeal. Such an approach, he reasoned, would simply replace the categorical rule rejected by the court in J. R. Norton Co., supra, 26 Cal.3d 1 with another categorical rule.

While we agree with the ALJ that our application of the makewhole remedy must proceed on a case-by-case basis, we also find a degree of merit in the Charging Party's argument. The Norton court was concerned that indiscriminate application of the makewhole remedy would discourage employers from seeking judicial review of our administrative determinations in "potentially meritorious" cases involving interference with employee free choice. In the court's view, that Board policy did not adequately protect employee free choice from the risk of arbitrary administrative actions. In reviewing the litigation posture of various employers, however, we have found that different cases possess different potential for success in the courts, depending on the nature of the question

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raised by the election objection.[7/] We also believe that the degree of deference paid to the Board's judgment by the courts affects the likelihood that an employer's argument will prevail on appeal.

In determining what degree of deference should be paid to administrative decisions, the courts have often distinguished between issues of fact and issues of law. (See Hi-Craft Clothing Co. v. NLRB (3d Cir. 1981) 660 F.2d 910, 914 [108 LRRM 2657].) As to issues of fact, administrative findings are generally paid great deference and overturned only if not supported by "substantial evidence." (Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd. (1979) 24 Cal.3d 335.) Such deference is based on the expertise of the agency (see Tex-Cal Land Management, Inc., supra, 24 Cal.3d 335 at 346) and also on the Board's role as the statutory finder of fact. (Abatti Farms, Inc. v. Agricultural Labor Relations Bd. (1980) 107 Cal.App.3d 317, 336, concurring opinion of Justice Staniforth.) The same deference is not always paid to an administrative agency's interpretation of statutory language, common law, or constitutional law, since those subjects are within

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[7/] We have generally assumed that our focus, for the purposes of applying the makewhole remedy, should be on the reasonableness of the employer's litigation posture before the courts of appeal. Hence, an inquiry into the nature and scope of judicial review of different types of administrative action seems necessary; some actions (or inactions) being more likely than others to be held an abuse of agency discretion. We do not mean to suggest that any argument made to the Board is unreasonable, simply because it failed to persuade the Board. However, once an argument has been rejected by the Board, the appealing employer must show not only that its argument to the Board was reasonable, but also that the Board's decision was based on an analysis that is so unreasonable that it constitutes an abuse of discretion. (See J. R. Norton Co., supra, 26 Cal.3d 1, 21; NLRB v. Miramar of California, Inc. (9th Cir. 1979) 601 F.2d 422 [102 LRRM 2241].)

the expertise of the judiciary.[8/] (See Piper v. Chris Craft Industries (1977) 430 U.S. 41; American Ship Building Co. v. NLRB (1965) 380 U.S. 300 [58 LRRM 2672].)

The instant case involves an issue that is neither purely factual, nor purely legal. The determination of the appropriate "employer" of a particular group of agricultural employees, where several separate agricultural businesses act in concert to produce a crop, is a mixed question of fact and law, or, as the ALJ suggests, a question of policy. This question requires the Board to explore, among other things, the business relationships between the business entities, their practices in prior seasons, and the relationship of each business to the employees; i.e., the "whole activity" of each potential "employer." The factors considered and the weight given to those factors varies from case to case, depending on the facts of the case. However, at the root of every determination of the appropriate employer is the Board's intent to establish stable collective bargaining relationships, a fundamental policy of the Agricultural Labor Relations Act (Act). (See Napa Valley Vineyards Co. (1977) 3 ALRB No. 22; Gourmet Harvesting and Packing (1978) 4 ALRB No. 14; Joe Maggio, Inc. (1979) 5 ALRB No. 26; Tony Lomanto (1982) 8 ALRB No. 44; W. G. Pack, Jr. (1982) 8 ALRB No. 30.)

In our view, the determination of the appropriate

[8/] Although some deference is paid to an agency's interpretation of its own enabling statute, the courts have clearly been less inhibited in expressing contrary interpretations where the issue involves legislative history or general rules of statutory construction. (See Southeastern Community College v. Davis (1979) 442 U.S. 397, 411-12.)

employer, under section 1156.2 of the Act,[9] is analogous to the determination of the appropriate unit of employees for bargaining purposes made by the National Labor Relations Board (NLRB), under 29 U.S.C. section 159(b).[10] The NLRB's primary concern in such unit determinations has been to group together only employees with a similar "community of interest," in order to promote effective labor-management relations and to reduce conflict between employees with different interests. The national board has not applied any hard and fast rules to determine appropriate bargaining units, but has considered the "wide variations in the forms of employee self-organization and the complexities of modern industrial organizations" on a case-by-case basis. (NLRB v. Hearst Publications (1944) 322 U.S. 111 [14 LRRM 614].)

Due to the NLRB's need for flexibility in the exercise of its discretion, NLRB unit determinations have been paid great deference, bordering on finality, by the courts. (See Packard Motor Car Co. v. National Labor Relations Bd. (1947) 330 U.S. 485

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[9] Labor Code section 1156.2 provides as follows:

> The bargaining unit shall be all the agricultural employees of an employer. If the agricultural employees of the employer are employed in two or more noncontiguous geographical areas, the board shall determine the appropriate unit or units of agricultural employees in which a secret ballot election shall be conducted.

[10] 29 U.S.C. section 159(b) provides, in relevant part, as follows:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof[.]

[19 LRRM 2397].) Since the NLRB need not establish the most appropriate unit, unit decisions are only set aside where the unit is clearly inappropriate and the Board's discretion has been exercised in an arbitrary and capricious manner. (See Vicksburg Hospital Inc. v. NLRB (5th Cir. 1981) 653 F.2d 1070 [108 LRRM 2074].)

Our determination of the appropriate employer in agriculture requires a similar flexible approach to the complexities of agricultural operations and the relationships between employees and potential employers.[11/] It therefore follows that our judgment as to which bargaining relationships will effectuate the policies of the Act should also be upheld on review unless arbitrary and capricious.

In the underlying representation case, we determined that Respondent and Vessey Foods, Inc. (Vessey) shared the responsibilities of growing, harvesting, and marketing a garlic

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[11/] Although our focus on the appropriate employer is different than the NLRB's focus on units of employees, we find more similarities than differences in the two processes. Each is concerned with creating legal relationships that conform to the practical needs and characteristics of the parties involved. In agriculture, our great concern for "stability" in these legal relationships is occasioned by the fluid, seasonal natures of the work, the work force, and even the providers of labor. (See Agricultural Labor Relations Bd. v. Superior Court (1976) 16 Cal.3d 392, 414-416.)

Moreover, we reject Member McCarthy's assertion that Labor Code section 1156.2 calls for plant-wide units in all cases. Although the statute states that "all the agricultural employees of an employer" shall be the appropriate unit, a landowner or grower is often involved with custom harvesters, harvest associations, packing houses, land management groups, and myriad other providers of agricultural services. The definition of the "employer" therefore can effectively carve a group of employees, all of whom work on one grower's crops, into separate bargaining units, depending on the services rendered by their "employer".

crop. During the 1980 season, Respondent owned or leased the land and cultivated and irrigated the crop. Vessey planted the crop, decided when to harvest, and was responsible for the grading, packing, and marketing of the crop. Costs and profits were shared equally by Respondent and Vessey in this and similar cooperative ventures for at least ten years prior to 1980. The harvest workers and supervisors, though carried on Vessey's payroll,[12/] had worked for Respondent both before and after the 1980 garlic harvest and had no other contact with Vessey. Although Vessey was contractually obligated to supply the labor for the harvest, both San Justo and Vessey had supervisory personnel in the fields during the harvest. When the UFW requested work-site access to communicate with the San Justo workers, David Wyrick, president of San Justo Farms, negotiated and monitored an agreement with the Union which included the garlic harvest workers.[13/]

Respondent argued that Vessey was the statutory employer of the garlic harvest workers because: (1) the San Justo-Vessey contract called for Vessey to supply the labor; (2) Vessey employee

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[12/] In prior years, the harvest workers had been carried on San Justo's payroll. The arrangement in 1980 appeared to be motivated by business concerns, such as cash flow, and did not substantially affect the employment relationships of the workers. The change in payroll practices also did not change Vessey and San Justo's agreement to split the labor costs equally.

[13/] Respondent asserted that the harvest was controlled by Vessey's "harvest superintendent," David Grimes. The record indicated, however, that David Wyrick and his chief supervisor, Rafael Duarte, were substantially involved with the hiring and supervision of the harvest workers. Several employee witnesses, in fact, testified that they believed they were hired by and working for Duarte, as on other occasions. Since Respondent's assertion regarding control of the harvest was rebutted, it does not appear that Respondent's continued reliance on that assertion is reasonable.

David Grimes actually supervised the harvest; (3) the harvest workers were on the Vessey payroll; and (4) Vessey had a one-half interest in the crop. After considering those arguments in light of the record of the investigative hearing, we found that Respondent's arguments either exaggerated Vessey's control over the harvest workers or relied on factors that are of little weight in our determination of the appropriate employer. First, the contractual agreements between businesses in agriculture are not controlling where the functions actually performed by the parties conflict with the terms of the contract. (See Freshpict Foods, Inc. (1978) 4 ALRB No. 4; Grow Art (1981) 7 ALRB No. 19.) To hold otherwise would elevate form over substance. Second, the fact that harvest workers were carried on the Vessey payroll was also without importance in our deliberations, since the location of the workers on the Vessey payroll was a matter of temporary convenience for San Justo and Vessey and had no effect on employment relationships. Third, although it is true that Vessey had a one-half interest in the crop and bore half the expenses, the same is true of San Justo. Finally, the evidence indicated, contrary to Respondent's assertions, that San Justo was substantially, if not primarily, responsible for the hiring and supervision of the harvest workers, and for negotiating a preelection access agreement with the UFW.

After considering the "whole activity" of both Respondent and Vessey, we decided that Respondent, by virtue of its continuous employment relationship with the harvest workers, its ownership of the land, and its involvement in the supervision and labor relations

of the harvest workers, was in the best position to enter a long-term bargaining relationship with the harvest workers over their terms and conditions of employment. Having found that San Justo exercised substantial control over the harvest workers, our reliance on the importance of continuity in employment relationships is based on our observation of the mobile nature of much of the agricultural work force. (See ALRB v. Superior Court, supra, 16 Cal.3d 392, 414.) In an industry typified by day labor, short seasons, and unskilled work, an individual employee may, within a short space of time, work for numerous different agricultural operations. That employee may often have little idea who is actually his or her employer. Given this inherent instability, the Board has uniformly attempted to craft rules and standards that place bargaining obligations on businesses with long-term involvement and substantial investment in agriculture and continuous relationships with their labor force. (See Joe Maggio, Inc., supra, 5 ALRB No. 26; Tony Lomanto, supra, 8 ALRB No. 44.) Our holding that Respondent here was the employer of the garlic harvesters is consistent with our past determinations that stable businesses and long-term employment relationships tend to produce stable labor relations.[14/]

We turn now to the reasonableness of Respondent's

[14/] This Board has made many policy decisions based on our knowledge of the peculiar conditions that exist in agriculture. Our decisions and our expert authority on these matters have been consistently upheld. (See ALRB v. Superior Court, supra, 16 Cal.3d 392; San Clemente Ranch, Ltd. v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 874; Jasmine Vineyards, Inc. v. Agricultural Labor Relations Bd. (1980) 113 Cal.App.3d 968; D'Arrigo Brothers of California (1978) 4 ALRB No. 45, Rev. den. by Ct.App., 1st Dist., Div. 2 (Mar. 20, 1980), hg. den. by S.Ct. (Apr. 21, 1980), upholding 3 ALRB No. 37.)

continuing argument that the Board acted arbitrarily in deciding the status of the garlic harvest workers. Respondent maintains that because the question of the appropriate employer is complicated, it is reasonable to seek judicial review. We disagree. Although the issue of the appropriate employer is potentially complicated, after consideration of the evidence presented by both sides in the instant case, it was clear to the Board that San Justo was the appropriate employer. Respondent succeeded in proving only that the responsibility and financial obligation for the garlic harvest was, to some extent, shared by San Justo and Vessey. The Board's reliance on continuity of employment between the harvest workers and San Justo as the decisive factor is soundly based on the policy of encouraging stable bargaining relationships. Since Respondent's only other arguments, regarding the Vessey payroll and the superficial terms of the San Justo-Vessey contract, were without substance, reliance on such factors would be contrary to the policies and purposes of the Act.

The Board's decision in the underlying representation case is consistent with ALRB precedent and our long-standing policy of promoting stable bargaining relationships in agriculture, while Respondent's arguments advance no policy of the Act. Moreover, the Board's exercise of its expert authority in determining the appropriate employer is entitled to great judicial deference because the Board has broad discretion in this area of policy. We conclude, therefore, that Respondent's litigation posture is not reasonable in this case. Respondent, having refused to bargain with the certified representative, must bear the costs of delaying the

bargaining process and make its employees whole for any economic losses suffered as a result of said refusal to bargain.

On the basis of the above and the record as a whole, we find that the makewhole remedy is appropriate in this case.[15/]

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent, San Justo Ranch/Wyrick Farms, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to meet and bargain collectively in good faith, as defined in section 1152.2(a) of the Agricultural Labor Relations Act (Act), with the United Farm Workers of America, AFL-CIO (UFW), as the certified exclusive collective bargaining representative of its agricultural employees.

(b) In any like or related manner interfering with, restraining, or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the Act.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

(a) Upon request, meet and bargain collectively in good faith with the UFW as the certified exclusive collective bargaining representative of its agricultural employees and, if an

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[15/] We will order that the makewhole period in this case begin on October 15, 1981, three days after the UFW's request to bargain. Three days is the period of time presumed necessary for Respondent to receive the Union's request. (See Cal. Admin. Code, tit. 8, § 20480(a).)

agreement is reached, embody the terms thereof in a signed contract.

(b) Make whole its present and former agricultural employees for all losses of pay and other economic losses they have suffered as a result of Respondent's failure and refusal to bargain in good faith with the UFW, such amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55, the period of said obligation to extend from October 15, 1981 until May 25, 1982, and from May 26, 1982 until such time as Respondent commences good faith bargaining with the UFW which results in a contract or bona fide impasse.

(c) Preserve and, upon request, make available to the Board and its agents, for examination, photocopying, and otherwise copying, all payroll records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the makewhole period and the amounts due employees under the terms of this Order.

(d) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(e) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 60 days, the period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered or removed.

(f) Mail copies of the attached Notice, in all

appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during the period from October 15, 1981, until May 25, 1982, and from May 26, 1982, until such time as Respondent commences good faith bargaining with the UFW which results in a contract or bona fide impasse.

(g) Provide a copy of the attached Notice in the appropriate language, to each agricultural employee hired by Respondent during the 12-month period following the date of issuance of this Order.

(h) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice and/or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period.

(i) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

IT IS FURTHER ORDERED that the certification of the United Farm Workers of America, AFL-CIO, as the exclusive collective bargaining representative of Respondent's agricultural employees be, and it hereby is, extended for a period of one year commencing on the date on which Respondent commences to bargain in good faith with the UFW.

Dated: September 22, 1983

ALFRED H. SONG, Chairman

JEROME R. WALDIE, Member

PATRICK W. HENNING, Member

MEMBER CARRILLO, Concurring:

I concur that Respondent's refusal to bargain was unreasonable and in bad faith, and its employees should be made whole for their consequent losses. However, in finding makewhole to be an appropriate remedy in this case, I do not rely on the degree of deference paid or owing our decisions by the courts. Evaluation of the likelihood of success of Respondent's argument on appeal may be a relevant consideration in determining whether Respondent pursued its litigation reasonably and in good faith. However, it cannot take the place of a case-by-case review of the employer's asserted grounds for refusing to bargain, including a careful examination of the facts and equities of each particular case. See the California Supreme Court's analysis of the language in Labor Code section 1160.3 authorizing the Board to impose makewhole, "when the Board deems such relief appropriate," J. R. Norton Co. v. Agricultural Labor Relations Board (1979) 26 Cal.3d 1, 36-38. In the instant case, I have reviewed the

facts and equities of the case without regards to the deference to be paid by the courts on appeal, and agree with the majority that Respondent's position here, if adopted, would lead to a result which runs counter to the policies and purposes of the Act.[1/] Such a position is unreasonable and makewhole should be awarded. (Cf. F & P Growers Association (1983) 9 ALRB No. 22.)

The Board's Decision in 7 ALRB No. 29 was a unanimous affirmation of the importance of an ongoing employment relationship in designating the statutory employer of a work force and the relative insignificance of formal contractual and payroll arrangements. In refusing to bargain after issuance of that Decision, Respondent does nothing to further the purposes of the Act. Its reliance on the complex relationship between it and Vessey to absolve it of the makewhole remedy, then, is misplaced. While free to plead its case in the courts, Respondent alone should bear the risk of that litigation.

Dated: September 22, 1983

JORGE CARRILLO, Member

[1/] Respondent's argument that its steady employees have had their votes improperly diluted by the votes of the more numerous seasonal harvesters is dependent on the validity of the underlying argument that it is not the statutory employer of the harvesters.

MEMBER McCARTHY, Concurring and Dissenting:

I have carefully considered the Board's long-established standard for determining when a technical refusal to bargain raises a "close case" and am in complete agreement with the Administrative Law Judge's (ALJ) well-reasoned and legally-supported discussion of that issue. I concur in the majority opinion only insofar as it finds that Respondent's unreasonable delay in responding to the Union's request that it commence negotiations is sufficient to warrant a makewhole award pursuant to J. R. Norton Co. (1980) 6 ALRB No. 26.[1/] In my view, the technical unfair labor practice which a Respondent invites a certified bargaining representative to file in order to obtain an appealable order of the Board should

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[1/] Consistent with my dissenting opinion in Holtville Farms, Inc. (1981) 7 ALRB No. 15, I do not consider matters outside the context of the election proceeding to be relevant in technical refusal to bargain adjudications and for this reason do not rely, as does the majority, on subsequent and independent unfair labor practices in assessing Respondent's "bad faith" for purposes of determining its make-whole liability under J. R. Norton Co. (1980) 6 ALRB No. 26.

not become a means by which to delay resolution of the underlying election issues.

In all other respects, I decline to endorse the views expressed in the lead opinion. I particularly disagree with the characterization of the principal employer issue herein as analogous to a bargaining unit determination under the National Labor Relations Act (NLRA). The question here is not what is the appropriate unit but only who is the employer of the agricultural employees involved, for generally all of its agricultural employees will comprise the appropriate unit.

NLRA section 9(b) authorizes the National Labor Relations Board (NLRB) to:

> ... decide in each case whether, in order to assure employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof...."

Accordingly, for purposes of collective bargaining, there is more than one way in which employees of a given employer may appropriately be grouped. (General Instrument Corp. v. NLRB (4th Cir. 1963) 319 F.2d 420 [53 LRRM 2514].) Conversely, the ALRA expressly denies this Board such discretion as Labor Code section 1156.2 provides that "the bargaining unit shall be all the agricultural employees of an employer." (Emphasis added.)[2/]

[2/] In unit determination matters, this Board has discretion only in those situations where a single employer has operations in noncontiguous geographical areas and such discretion is exerciseable only after the Board has made an express finding of noncontiguity. (Lab. Code § 1156.2. See, e.g., Bruce Church Co. (1976) 2 ALRB No. 38.)

Under our Act, therefore, the only unit appropriate for collective bargaining shall be an employer-wide unit, one of several alternatives available to the national Board.

While conceding, as they must, that unit appropriateness under the NLRA turns on considerations other than those which are germane to questions of employer status, my colleagues nevertheless seek to blur those distinctions, thereby failing to properly identify the vastly dissimilar concepts. The independence of employer questions vis-a-vis unit issues finds meaning in the United States Supreme Court's per curiam Decision in South Prairie Construction Company v. Operating Engineers, Local 627 (1976) 425 U.S. 800 [92 LRRM 2507]. The union had filed an unlawful refusal to bargain charge in which it alleged that since two companies were in reality a single employer, the collective bargaining agreement which bound one of the companies should apply with equal force to a bargaining unit comprised of the employees of the second company. The NLRB concluded that the companies were in fact separate employers and dismissed the complaint, thereby obviating any necessity of reaching the unit question. The Court of Appeals reversed, agreeing with both of the union's contentions; i.e., that the two companies were a single employer and that the employees of both companies comprised an appropriate unit under NLRA section 9 for purposes of collective bargaining. While upholding the lower court's "single employer" finding, the Supreme Court found that in also deciding the unit question, the court had impermissibly invaded an area in which the NLRB has primary competence. Since selection

of an appropriate bargaining unit "lies largely within the discretion of the [NLRB]...we think the function of the court of appeals ended when the Board's error on the 'employer' issue was 'laid bare' [citations]."

On similar facts, but in a contract action pursuant to NLRA section 301, the Ninth Circuit Court of Appeals held, per curiam, that while federal courts lack jurisdiction to initially determine what is an appropriate bargaining unit, they are required to decide procedural employer issues. (Brotherhood of Teamsters v. California Consolidated, Inc. (9th Cir. 1982) 693 F.2d 81 [111 LRRM 2785.) In that case, the union had sought a declaratory judgment of the district court that two companies comprise a single employer, joint employer, or alter egos, and therefore the collective bargaining agreement with one of the companies was controlling as to the other. The lower court's dismissal of the action, on the grounds that it lacked jurisdiction to adjudicate the complaint, was reversed and remanded by the Ninth Circuit with directions to rule on the employer issue. The Circuit Court had rejected the union's argument that the NLRB commands exclusive jurisdiction over employer issues, holding that courts may determine such issues in 301 proceedings and only matters concerning unit appropriateness need be reserved in the first instance to the NLRB.

I also question an implication which pervades the whole of the majority opinion and which seemingly proposes that perhaps the statutory definition of "employer" should be measured by longevity or economic investment in agriculture. The basic rules

governing employer status under the federal and state labor laws are well-defined and nowhere do they suggest or infer that "economic stability" is a factor to be considered and weighed in determining who hires, fires, supervises, or compensates a particular set of employees or controls the labor-relations policies which govern them.

Dated: September 22, 1983

JOHN P. McCARTHY, Member

NOTICE TO AGRICULTURAL EMPLOYEES

A representation election was conducted by the Agricultural Labor Relations Board (Board) among our (San Justo Ranch/Wyrick Farms) employees on August 18, 1980. The majority of the voters chose the United Farm Workers of America, AFL-CIO (UFW), to be their union representative. The Board found that the election was proper and officially certified the UFW as the exclusive collective bargaining representative of our agricultural employees on October 2, 1981. When the UFW asked us to begin to negotiate a contract, we refused to bargain so that we could ask the court to review the election. The Board has found that we have violated the Agricultural Labor Relations Act by refusing to bargain collectively with the UFW. The Board has told us to post and publish this Notice and to take certain additional actions. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because it is true that you have these rights, we promise that:

WE WILL, on request, meet and bargain in good faith with the UFW about a contract because it is the representative chosen by our employees.

WE WILL make whole each of the employees employed by us at any time on or after October 15, 1981, during the period when we refused to bargain with the UFW, for any money which they may have lost as a result of our refusal to bargain, plus interest.

Dated: SAN JUSTO RANCH/WYRICK FARMS

By: _____
Representative Title

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 112 Boronda Road, Salinas, California, 93907. The telephone number is (408) 443-3161.

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

San Justo Ranch/Wyrick Farms (UFW)

9 ALRB No. 55
Case No. 82-CE-2-SAL

ALJ DECISION

In this "technical refusal-to-bargain" case, the ALJ concluded that the makewhole remedy was inappropriate because Respondent's litigation of the validity of the underlying certification was reasonable and in good faith.

As to reasonableness, the ALJ interpreted the Board's statement, in its election decision, that the question of the proper employer for bargaining purposes was complex, as an indication of a "close case". Under J. R. Norton Co. v. ALRB (1979) 26 Cal.3d 1, an employer is held to be reasonable in appealing a "close case" and may not be discouraged from seeking judicial review by the risk of makewhole.

As to Respondent's good faith, the ALJ declined to accept or consider evidence of a preelection promise to give a party if the Union lost, post-election discrimination, and denial of access to UFW representatives. The ALJ was not persuaded that evidence of a two-month delay by Respondent in stating its intention to refuse to bargain and an ambiguous remark of an agent of Respondent was sufficient to prove that Respondent was litigating the certification simply to delay bargaining.

BOARD DECISION

The Board reversed the ALJ's conclusion and ordered Respondent to make its employees whole for its refusal to bargain.

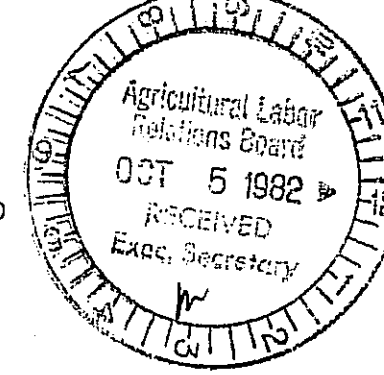
As to bad faith, the Board considered Respondent's ten-week delay in declaring its intention to appeal the certification, combined with the statement of a supervisor and various acts of discrimination, to be evidence that Respondent refused to bargain as pretense to avoid bargaining.

As to the reasonableness of Respondent's legal argument, the Board rejected the ALJ's conclusion that a complicated case is a "close case" within the meaning of J. R. Norton. Although the evidence indicated that Respondent shared control over the harvest workers with another business, the Board held that the continuity of Respondent's employment relationship with the workers was a decisive factor in determining the appropriate "employer" for bargaining purposes. Since the Board's determination was based on promoting stable, long-term bargaining relationships, and since Respondent's arguments served no policy of the Act, Respondent's further litigation of its election objection was found unreasonable. The Board relied, in part, on the deference paid to the Board's unit decisions by the courts.

CONCURRING AND DISSENTING OPINIONS

Member Carrillo, however, did not agree that judicial deference was a factor in determining the reasonableness of the Employer's litigation posture. Member McCarthy did not join in the conclusion that Respondent was unreasonable and would affirm the ALJ on that point.

* * *



STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
SAN JUSTO RANCH/WYRICK FARMS,	)	Case No. 82-CE-2-SAL
	)	
Respondent,	)	
	)	
and	)	
	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
	)	
Charging Party.	)	
	)	

Appearances:

Jose B. Martinez, Esq.
for the General Counsel

Howard Silver, Esq.
for Respondent

Daniel A. Garcia, Esq.
for Charging Party

DECISION OF THE ADMINISTRATIVE LAW OFFICER

STATEMENT OF THE CASE

This case was heard by me on May 25 and 26, 1982. By complaint issued February 16, 1982, General Counsel alleged that Respondent San Justo Ranch/Wyrick Farms has refused and continues to refuse to bargain with the United Farm Workers of America, the certified representative of Respondent's employees. By answer filed March 1, 1982, Respondent has admitted the following essential allegations: that it is an agricultural employer; that the United Farm Workers of America is a labor organization certified as the collective bargaining representative of all of Respondent's employees; that after the Board's certification, the UFW requested negotiations and that Respondent has refused to commence them. Respondent has denied that it violated the Act in any way and interposes three affirmative defense, all of which go to the validity of the Board's certification of the UFW as the representative of Respondent's employees.

Respondent has committed a so-called technical refusal to bargain designed to test the Board's certification. Although disputing the validity of the certification, Respondent is not seeking further Board review of it, but rather judicial review of the Board's decision, pursuant to the only procedure set out by the Act. (Labor Code section 1160.8.) The only question before me, then, is the scope of the recommended remedial order. I must determine, in accordance with the standards set out in J.R. Norton v. Agricultural Labor Relations Bd. (1979) 26 Cal.3d 1, see also Holtville Farms (1981) 7 ALRB No. 15, whether Respondent's test of the certification is reasonable and in good faith.

Although the parties stipulated that I may use cited portions of the transcript of the certification proceeding in my consideration of Respondent's motivation, they strongly disagree about what other evidentiary aids I may use. Thus, before considering the precise issue before me, there are a number of preliminary contentions which must be addressed.[1/]

General Counsel offered to prove that a few days before the election, Respondent's foreman, Rafael Duarte, made statements to employees "that they should vote against the union and vote for the employer and that if the employer won . . . the election, that the employer would hold a big party for them afterwards to show his gratitude." On the basis of this offer, I ruled such evidence irrelevant to the question of Respondent's motivation in refusing to bargain. General Counsel presently urges that I reconsider my ruling and use the excluded "testimony" in my decision. Post-Hearing Brief, p. 5. However, General Counsel's offer of proof cannot stand as evidence in its own right of the facts concerning which the offer was made; the offer is simply designed to permit the Board to measure the propriety of my ruling.

Construing General Counsel's argument as a motion to reopen the record, I reaffirm my ruling. General Counsel contends that because one can only determine Respondent's motive in refusing to bargain on the basis of the totality of the circumstances, it was

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1. After the close of the hearing, I received a motion to strike certain portions of the General Counsel's post-hearing brief. The text of the decision indicates my treatment of the matters raised by Respondent.

error to exclude any circumstance from my consideration. As with any question of admissibility, it depends upon what the circumstances go to prove.

I indicated at the hearing that this statement did not go directly to Respondent's motive in refusing to bargain but solely to whether the election might have expressed the free choice of employees. To the extent that conduct which may interfere with that choice reflects upon an employer's willingness to be bound by it, there must be some initial evaluation of the gravity of such conduct in order to assess what it may indirectly reveal. Put another way, if animus is to be measured by the lengths an employer is willing to go to defeat a union, short lengths are not probative at all.

On the basis of Coachella Imperial Distributors (1979) 5 ALRB No. 73, General Counsel argues that "a promise of a post-election party to celebrate a union defeat is a cognizable benefit" which indicates Respondent's resolve not to sign a contract. The party found violative of the Act in the Distributors case was a pre-election party and though largesse on the scale seen in that case might be seen as a promise of benefits to come, the real vice of that party was that it was of considerable present benefit, in effect, a bribe. A promise of a party stands on different footing; considered as a bribe, it must be one of its weakest forms. Not only was it obviously not sufficient to have affected the outcome of the election in this case, but it was not necessarily an unfair labor practice. Thus, in Rupp Forge Company (1973) 201 NLRB 393, 400, the Board affirmed the conclusion of the ALJ that an employer's promise of a beer party was not a violation

of the Act:

> It may be said that the promise of a beer party if he won the election was a promise of benefit if a sufficient number of employees voted against the Union and for the Respondent. I am not convinced, under the circumstances, that such promise of benefit would have even minimal impact upon the employees in their secret ballot. It clearly is not a significant benefit. It could even be said that where the Union gives a beer party during organizational efforts that impliedly the same or similar action would be taken if the Union were successful. In short, I am not persuaded that the promise of a beer party if the Company won the election is a promise of a benefit that is significant or has any significant impact upon an employee exercising his rights under Section 7 of the Act, or in voting a free choice as to a collective bargaining representative or not. I find such conduct, under the circumstances, not to be violative of Section 8(a)(1) of the Act. 2/

General Counsel would also have me use a settlement agreement as background evidence of Respondent's hostility toward the union. The agreement involves allegations of threats and discriminatory treatment of union adherents. GC 2-7. It contains the standard non-admission clause and does not expressly provide that it may be used as evidence. I provisionally admitted the agreement, subject to Respondent's motion to strike. Respondent continues to insist that no evidentiary use be made of such materials, citing a number of NLRB cases for the general proposition that pre-settlement conduct may not be considered a ULP.3/ Respondent also adduced evidence from its former attorney, Randolph Smith, who testified that he understood that with the settlement "the slate was wiped clean without a substantive adjudication on the

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2. Cf. Renmuth, Inc. (1972) 175 NLRB 298 in which the promise of parties, picnics and sporting events was held violative of 8(a)(1).

3. See Respondent's Post-Hearing Brief, pp. 9-10.

merits . . . that any of these events arising out of . . . this election or any alleged statements by any agent of Mr. Wyrick's were . . . not to be used in any subsequent proceedings especially with regard to RC matters." II:40. General Counsel put on no contrary evidence. On the basis of Smith's testimony, Respondent argues that the Board is estopped from introducing such evidence. Because of my disposition of the evidentiary issue, I do not need to reach Respondent's estoppel argument.

Respondent is mistaken on the general proposition that pre-settlement conduct cannot be used as background evidence, although the cases it cites are authority for the different proposition that pre-settlement conduct cannot be the subject of an unfair labor practice finding. It is a different question whether the agreement itself may stand as evidence of that conduct.

> Evidence of a party's presettlement conduct is admissible with respect to issues that are excepted from the settlement or if occurring prior to the settlement are not covered thereby, though in the former case it would appear to be the better practice to have them included in one proceeding, Tompkins Motor Lines, Inc., 142 NLRB 1 (1963), enforcement denied on other grounds 337 F.2d 325 (C.A. 6, 1964); Cloverleaf Cold Storage Co., 160 NLRB 1484, fn. 1, 1486 (1966). Presettlement conduct of the party that serves to establish motive or objective in acts of the party subsequent to the settlement, as well as postsettlement conduct, is admissible, whether or not the settlement agreement is set aside. Northern California District Council of Hodcarriers and Common Laborers of America, AFL-CIO, et al. (Joseph's Landscaping Service, 154 NLRB 1384, fn. 1 (1965), enf'd. 389 F.2d 721 (C.A. 9, 1968); Cloverleaf Co., 160 NLRB 1484; Jake Schlagel, Jr., d/b/a Aurora and East Denver Trash Disposal, 218 NLRB 1 (1975.) . . . On the other hand, it is my view, that the very documents encompassing an informal settlement agreement with a nonadmission clause contained in them do not themselves constitute competent evidence of the prior alleged unlawful conduct of the settling party; nor are

they admissible to show animus, Poray, Inc., 143 NLRB 617 (1963). 4/

Parker Seal Company (1977) 233 NLRB 332, 335.

Accordingly, I reject the Exhibits.

WHETHER RESPONDENT'S TEST OF THE CERTIFICATION IS REASONABLE AND IN GOOD FAITH

a.

REASONABLENESS

Respondent claims its objection raises a novel legal issue "requiring judicial review". The Board did recognize in its decision that the issue of who the agricultural employer is in this case is not a simple one. 5/

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4. Poray, Inc., supra, indicates that even formal settlements have no probative value.

5. "Evidence presented at the hearing indicates that both San Justo and Vessey Foods have a substantial interest in the garlic crop grown on San Justo's property, and that the garlic harvesting employees have significant ties to both San Justo and Vessey. As the IHE notes in his Decision, the facts of this case at first glance suggest a joint employer relationship between San Justo and Vessey, since both have an equal financial interest in the garlic crop and both are involved in the growing and harvesting of the crop and supervision of the workforce. [Cite] However, there is no evidence of common ownership, and neither San Justo nor Vessey owns stock in or participates in the management of the other. In addition, the agreement between San Justo and Vessey only covers the garlic crop grown on San Justo's property, and San Justo and Vessey are separately engaged in other growing and harvesting operations throughout the year. We therefore find that it would be inappropriate to certify San Justo and Vessey as joint employers.

We therefore must determine whether San Justo or Vessey employed the workers who harvested garlic on San Justo's property in 1980. In determining which of several parties is the employer of a group of agricultural employees, we look not to any single factor but consider the "whole activity" of each of the parties in order to determine which should assume the collective bargaining responsibilities. [Cite] This approach best serves the purposes of the Act because it provides the most stable bargaining relationship. [Cite]"

Board Decision, p. 2.

The union, on the other hand, argues that because a labor board's discretion in determining the scope of the bargaining unit is ordinarily accorded a deference rarely disturbed on appeal, it is unreasonable for Respondent to expect to prevail in its challenge to the certification and it follows that Respondent's continued contest of the certification must be unreasonable. It seems to me that assessing the "reasonableness" of a Respondent's argument in terms of the margin of discretion ordinarily possessed by the board, simply substitutes another kind of overbroad categorical approach for the case-by-case one required by the Supreme Court in J.R. Norton Co. v. A.L.R.B., supra. It is one thing to conclude that a party cannot reasonably expect to prevail because the weight of authority is opposed to the position it has taken,[6/] but another to say that deference owed to the board renders any position the party takes on certain kinds of questions per se unreasonable.

This case appears to fit within the ambit of those cases in which our board has declined to apply make-whole. In D'Arrigo Bros. (1980) 6 ALRB No. 27, our board held that it would not apply make-whole in the first case in which it announced its departure from the NLRB's "laboratory conditions" standard for reviewing election misconduct. And in High and Mighty Farms (1980) 6 ALRB No. 31, the board declined to order make-whole in a case involving the employer's contest of a novel peak calculation. "When Respondent refused to bargain in order to test

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6. See, e.g., J.R. Norton (1980) 6 ALRB No. 26; George Arakelian Farms (1980) 6 ALRB No. 28.

the validity of the certification, there were no judicial decision involving the Board's determination of peak employment. We find that these factors resulted in a 'close [case] that raises important issues concerning whether the election was conducted in a manner that truly protected the employees' right of free choice." 6 ALRB No. 31, at 4. See also, Charles Malovich (1980) 6 ALRB No. 29.

The board's acknowledgement that the unit question in this case is a difficult one seems little different from its conclusion in the above-cited cases that the issues raised by the Respondents were close ones. Accordingly, I find Respondent's litigation posture reasonable.[7/]

THE QUESTION OF RESPONDENT'S GOOD FAITH

In Holtville Farms (1981) 7 ALRB No. 15, the Board found Respondent Holtville's litigation posture "reasonable." It had to next whether the totality of Holtville's conduct "indicate[d] that it was motivated by a desire to delay bargaining and undermine support for the union." The board found that Holtville was so motivated, but partly on the basis of evidence that Respondent had encouraged its employees to form an independent union. We have no such evidence in this case; instead, General Counsel and the union rely on a variety of factors which are said to add up to bad faith, including Respondent's two-month delay in responding to the union's request to bargain; evidence that Ralph Duarte told employees

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7. The union also points in its post-hearing brief that David Wyrick referred to the garlic workers as "his" employees; however, as the board decision makes clear, determining who the employer is in cases of this type is not so much a question of fact, as one of policy as to which Wyrick's statement is not probative.

Respondent would not sign a contract; the IHE's finding that Duarte took an employee's activities into account in determining his qualifications to work; and evidence that David Wyrick interfered with organizer John Brown's attempt to take access.

I shall consider each of these factors in turn.

THE QUESTION OF TIMING

The board's certification of the UFW as bargaining representative of Respondent's employees issued on October 2, 1981. See GC I-L. On October 12, 1981, the union wrote to Respondent to request bargaining. Complaint, Para. 6, Admitted. Respondent did not refuse to bargain until December 21, 1981. Complaint, Para. 7, Admitted. General Counsel contends that this two month delay between the request and the refusal to bargain also indicates bad faith, citing Holtville Farms (1981) 7 ALRB No. 15, see also, Masaji Eto (1980) 6 ALRB No. 20. In Holtville Farms, supra, our board used a period of delay in responding to the union's bargaining request nearby equal to that which appears in this case as one indicium of bad faith. Absent some extraordinary period of delay not present in this case or other evidence relating to the reason for delay, I am reluctant to view a delay of this length as highly probative on the issue of Respondent's good faith.

DUARTE'S STATEMENT

General Counsel put on Nemorio Ramirez to testify that one of Respondent's supervisors, Rafael Duarte, said:

> That election was not even valid because the union had brought on a lot of people.

* * *

> [They] might have to have another election and even if it was valid, that the company was not going to sign any contract with the union. II:22.

Duarte denied making these statements. General Counsel and the UFW argue that Ramirez is the more credible witness. Duarte was an incredible witness but Ramirez himself testified with a palpable hostility bordering on the vengeful which prevents my ascribing the same weight to this evidence that General Counsel and the union give to it.[8/]

This case is a technical refusal to bargain, involving a deliberate refusal to engage in the process which ordinarily leads to contracts under our Act. In this context, even crediting Ramirez' testimony that Duarte made a statement to the effect that Respondent would not sign a contract, the statement is inherently ambiguous.[9/] However, if the statement is too ambiguous to base a conclusion on, by virtue of the same ambiguity, I cannot discount it; its significance will depend upon consideration of the rest of the evidence in this case.

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8. In assessing the weight to be given the statement, both General Counsel and the union paraphrase it as meaning that Respondent would never sign a contract with the union. See General Counsel's Brief, p. 8; Union Brief, p. 11. The "never" adds a degree of emphasis and finality not necessarily present in the statement attributed to Duarte by Ramirez.

9. General Counsel relies on Climate Control Corp. (1980) 251 NLRB 751 as authority for the proposition that the statement he attributes to Duarte (that Respondent would never sign a contract) evidences union animus. In the first place, as noted earlier, the statement as related by Ramirez is not so emphatic; indeed, such emphasis would eliminate the ambiguity I perceive in it. But Climate Control is distinguishable on its facts. The evidence in that case revealed a pattern of statements that the Respondent would delay board proceedings for as long as possible in order to defeat employee wishes. See, 251 NLRB at 754.

DUARTE'S CONDUCT AND WYRICK'S INTERFERENCE WITH ACCESS

As noted, the IHE found that Duarte took an employee's "union activities into account in determining his qualifications to work in other crops at San Justo." IHE Decision, p. 16. General Counsel and the union also rely on one other piece of evidence taken from the RC proceeding, namely, organizer John Brown's testimony that David Wyrick interfered with UFW access taking.

Each of these incidents could be either an unfair labor practice or grounds to set aside an election. So far as either the IHE's findings or the evidence itself might be said to constitute proof of the commission of unfair labor practices, it has long been the rule under the NLRA that such violations may not be litigated in an RC proceeding. Times Square Store Corporation (1948) 79 NLRB 361, Spray Sales and Sierra Rollers (1976) 225 NLRB 1089. Thus, the conclusion regarding Duarte's treatment of Ramirez and Brown's testimony about Wyrick's interference with access, do not establish violations of the Act which may be used for background purposes. See also, Hansen Farms (1978) 4 ALRB No. 41. So far as they represent findings of conduct which might have affected the outcome of the election or of any other issue which might have been appropriately litigated in representation proceedings, some further analysis is necessary. See, e.g., Teamsters Union Local 865 (1977) 3 ALRB No. 60.

The IHE's finding that Duarte took Ramirez' union activities into account is based upon the following testimony of Ramirez.

Q: Did you continue working on San Justo land?

A: After the garlic, no.

Q: Why not?

A: Because the foreman, Rafael Duarte, said that the ones that had voted for the union, there would be no more work.

RC III:56. 10/

At this point, Respondent's Counsel objected on the grounds that the sole issue before the IHE was the identity of the employer. The IHE permitted the question because of the "relevance that [the] statement may have to a possible issue in the case of employee interchange between the two entities [Vessey and San Justo] sufficient that these employees might be considered the employees of San Justo while working in the garlic rather than [employees of] Vessey." RC II:59. When counsel for Respondent again moved to strike the witness' testimony, the IHE denied the motion, stating:

> I'm going to admit that statement not because of the reason that Mr. Duarte gave, but for the fact that it shows that this witness applied to work at San Justo and was denied work, and that because he was denied work there is no continuity of employment.
>
> RC II:62

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10. As noted, Ramirez, who was testifying through an interpreter, first testified Duarte said that the "ones that had voted for the union" would not be hired. After a long colloquy in English during which the IHE indicated his interest in a statement more specifically directed at Ramirez, Ramirez volunteered such testimony in response to a question about what type of work he was seeking:

> Because after finishing up the tomato, they went to the thinning of lettuce. And then the tomato was going to commence. And then he said plainly that there was no work for me because I had voted for the union.
>
> III:61

Nevertheless, the testimony was uncontradicted and the IHE credited it.

Since Counsel for Respondent was prepared to stipulate that Ramirez was denied employment, RC II:61, his subsequent failure to cross-examine Ramirez about the Duarte statement may have been induced by the IHE's ruling regarding the relevance of the testimony. As a result, Respondent was simply on no notice that it was litigating what amounted to an act of discrimination, which calls for a specific intent. The problem of lack of notice is also true of the question regarding David Wyrick's interference with access. The sole issue litigated in the RC hearing was the identity of the employer; Brown's testimony was elicited on the theory that Wyrick's interest in the crew, as exemplified by his interference with access, bore on that question. As such, the question whether access was actually denied was barely litigated; Brown's entire testimony about Wyrick's alleged interference with access takes 5 transcript lines. (III:84, ll. 17-21.)

Accordingly, I do not rely on either of these factors.

CONCLUSION

The "totality of the circumstances" from which to draw a conclusion of bad faith is an ambiguous statement and a two month delay in respondent to the union's bargaining request. I conclude that General Counsel has not met his burden of proving bad faith and I shall simply recommend a bargaining order.

RECOMMENDED ORDER

Pursuant to Labor Code Section 1160.3, the Respondent, San Justo Ranch/Wyrick Farms, its officers, agents, successors and assigns is hereby ordered to:

1. Cease and desist from:

(a) Refusing to meet and bargain collectively in good faith, as defined in Labor Code Section 1155.2(a), with the United Farm Workers of America, AFL-CIO (UFW), as the certified exclusive bargaining representative of its agricultural employees in violation of Labor Code Section 1153(e) and (a).

(b) In any like or related manner interfering with, restraining or coercing agricultural employees in the exercise of the rights guaranteed to them by Labor Code Section 1152.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

(a) Upon request, meet and bargain collectively in good faith with the UFW as the certified exclusive collective bargaining representative of its agricultural employees, and if an understanding is reached, embody such understanding in a signed agreement.

(b) Sign the Notice to Employees attached hereto. Upon its translation by a Board Agent into appropriate languages, Respondent shall thereafter reproduce sufficient copies in each language for the purposes set forth hereinafter.

(c) Post copies of the attached Notice for 60 consecutive days at places to be determined by the Regional Director.

(d) Provide a copy of the Notice to each employee hired by the Respondent for 60 consecutive days following the issuance of this Decision.

(e) Mail copies of the attached Notice in all appropriate languages, within 30 days from receipt of this Order, to all

employees employed during the payroll periods immediately preceding the election through the date of the order.

(f) Arrange for a representative of Respondent or a Board Agent to distribute and read the attached Notice in appropriate languages to the assembled employees of Respondent on company time. The reading or readings shall be at such times and places as are specified by the Regional Director. Following the reading, the Board Agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

(g) Notify the Regional Director in writing, within 30 days from the date of the receipt of this Order, what steps have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing what further steps have been taken in compliance with this order.

DATED: October 4, 1982

THOMAS M. SOBEL
Administrative Law Officer

NOTICE TO EMPLOYEES

The Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act by refusing to meet and bargain about a contract with the UFW. The Board has ordered us to post this Notice and to take certain other actions. We will do what the Board has ordered, and also tell you that:

The Agricultural Labor Relations Act is a law that gives farm workers these rights:

(1) To organize themselves;

(2) To form, join or help any union;

(3) To bargain as a group and to choose anyone they want to speak for them;

(4) To act together with other workers to try to get a contract or to help or protect each other; and

(5) To decide not to do any of these things.

Because this is true, we promise you that:

WE WILL, on request, meet and bargain with the UFW about a contract because it is the representative chosen by our employees.

DATED: SAN JUSTO RANCH/WYRICK FARMS

By: _____
Representative Title

This is an official notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE.